

SINGH (Migration) [2018] AATA 2722 (25 June 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division
APPLICANT: Mr Hardeep SINGH
CASE NUMBER: 1601508
DIBP REFERENCE(S): BCC2015/1434143
MEMBER: Ian Garnham
DATE: 25 June 2018
PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 25 June 2018 at 1:02pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Spousal relationship – Lodgement date of visa – Compelling reasons – Sponsorship withdrawn – Applicant’s drug addiction – Applicant’s wife’s health – Bond with applicant’s wife’s son – Child’s schooling in home country – Criminal charges – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 65, 359A, 362A, 375A

Migration Regulations 1994 (Cth), Schedule 2 cl 820.211, Schedule 3 Criteria 3001

CASES

Babici v MIMIA (2005) 141 FCR 285

Minister for Immigration and Border Protection v Singh [2016] FCAFC 183

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration made on 21 January 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 18 May 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) because the review applicant did not meet the Schedule 3 criteria and there were not compelling reasons to waive the criteria.
4. The applicant appeared before the Tribunal on 8 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from his wife and ex-sponsor, Dhara Setasingh Bhati. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi and English languages.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the review applicant meets the Schedule 3 criteria and, if not, whether there are compelling reasons for not applying the criteria.

SCHEDULE 3 CRITERIA (cl.820.211(2)(d))

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

7. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
8. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001:

9. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
10. In this case the review applicant does not dispute that he does not meet criterion 3001. He last held a substantive visa on 12 July 2011. This application was made over 3 years later.
11. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

12. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
13. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babici v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

1. Policy considerations:

14. The relevant Departmental policy guidelines are contained in the Procedures Advice Manual (PAM3).
15. The policy stresses that; ...the provisions are not intended to give, or be perceived to give an unfair advantage to persons who:
 - *Fail to comply with their visa conditions or*
 - *Deliberately manipulate their circumstances to give rise to compelling reasons or*
 - *Can leave Australia for a partner visa outside Australia.*

16. In this case it is appropriate to consider the migration background and actions of the review applicant because, on its face, the evidence suggests that he has failed to comply with his previous visa conditions and grossly manipulated his circumstances to seek to give rise to compelling reasons.

2. Relevant background:

17. The visa applicant came to Australia with his ex-wife on 09/06/2009 on a subclass 572 student visa that was in effect until 12/07/2011. He then remained unlawfully in Australia until this application was lodged on 19/05/2015.

18. In response to the delegate's request for information, by statutory declaration dated 29 November 2015¹ the visa applicant said that he came to Australia from India with his former wife. He said that he was not accepted by his wife's family in India. They originally settled in Brisbane but the visa applicant could not obtain work there so he moved to Melbourne and he says he and his ex-wife grew apart. At the hearing he also said that he did not know that his visa had expired and his ex-wife extended her visa without telling him and she divorced him on 22/04/2012.
19. The visa applicant said he did not know his visa had expired until September/October 2011. He said he became depressed and a friend advised him to live here. He claims he began taking recreational drugs from December 2011.
20. The parties to this relationship claim they met on 4 February 2014 and they committed to a shared life together on 21/07/2014 when they claim to have begun living together. They married on 23 April 2015.²
21. On 30 November 2016 the visa applicant's wife and then sponsor contacted the tribunal and advised that she wished to withdraw her sponsorship. She was advised by the tribunal to contact the department (DIBP) directly with this information. DIBP withdrew the sponsorship on the same day.
22. On 20 April 2017 the tribunal (differently constituted) wrote to the visa applicant inviting them to comment or provide information with respect to, among other things, the withdrawal of the sponsorship.
23. On 4 May 2017 the visa applicant's wife wrote to the tribunal (with an authority by the visa applicant to represent him) and advised that; the visa applicant was currently incarcerated, she had withdrawn the sponsorship because of his drug addiction, but in the last 2/3 months his efforts to deal with his addictions had improved and when he was released she would care for his mental health and resume the immigration process.
24. On 9 May 2017 the visa applicant's wife again wrote to the tribunal and advised that; the visa applicant could not focus on his migration issues because of his drug addiction, she went to India for three months after the visa application was lodged to see his family and return to Australia with her then 14yo son who had been living in India, the visa applicant has formed a strong bond with her son, the visa applicant had made strong attempts to rehabilitate and he would be successful in overcoming his drug addiction soon.

3. There is no evidence before the tribunal that, after the visa applicant's visa ceased to have effect he made any attempt to regularise his migration status until after he had married and his new wife had agreed to sponsor the visa application. Accordingly I am satisfied that he knowingly manipulated his circumstances in an attempt to generate compelling reasons for not applying the Schedule 3 criteria.

4. *Putative compelling reasons:*

25. In the submissions to the delegate and at the hearing the claimed compelling reasons of the parties, as to why the Schedule 3 criteria should be waived in the circumstances may be summarised as follows:

¹At F: 41 (DIBP)

²At F: 8 (DIBP)

- The visa applicant's drug addiction is best treated in Australia as the medical system in India as no such treatments available;
 - The visa applicant's wife, who is a permanent Australia resident, also has health concerns and the visa applicant provides her with care and emotional support;
 - The visa applicant has formed a close bond with his wife's son and provides him with care and support;
 - The visa applicant's ex-sponsor and son cannot go to India for a prolonged period because her son is now enrolled in school in Australia;
 - If the visa applicant is required to go offshore it will significantly reduce the family income.
26. Firstly, there is no documentary information concerning the visa applicant's drug addiction, other than a methadone script dated 26/11/2015³ that has been provided to the tribunal. There is no evidence that he has ever undergone or is undergoing any formal treatment for his drug addiction. In addition, I have no information before me that drug addiction treatments are not available in India.
27. Secondly, after the hearing I provided the parties with an opportunity to provide further information in respect of their putative compelling reasons. On 21 November 2017 the visa applicant's wife provided a personal letter stating that she faces insomnia and sometimes takes sleeping pills, when she does so it is difficult to wake up and the visa applicant gets her son breakfast on these occasions. She also said she has clinical depression and anxiety and the visa applicant's presence makes the home environment lively. I note that prior to this claimed relationship beginning the visa applicant's wife coped adequately with her life without the visa applicant's presence when her son was living in India. In all of the submissions, there is no evidence to support the visa applicant's wife's claim that she has been treated for clinical depression and anxiety.
28. Thirdly, little evidence was provided to demonstrate the alleged strong bond between the visa applicant and his wife's now 16yo child. At the hearing and in his wife's submissions the parties said that the visa applicant watches cricket and movies with her son and usually transports him to and from school. Her son also appears in some of the photographs they have provided. I am mindful that up until 2 years ago the child lived in India and there is no independent evidence suggesting he requires the care and support of the visa applicant. The delegate was also concerned that the parties had not addressed the role that the child's biological father (and former husband of the visa applicant) plays in his life. In response to these issues raised by the delegate, in her submission received on 9 May 2017, the visa applicant's wife said that her son does not have a relationship with his biological father. He sometimes calls seeking to speak to him but she does not let him do so because he plays mind games with him. She also said that he never went to Court to try for custody of their son.
29. Fourthly, I note that after the parties were married the visa applicant's wife went to India for 3 months. She said that she went for her sister's wedding and visited the visa applicant's family on two occasions. She returned to Australia in September 2015 with her son and said at the hearing that she has since returned to India again with her son. Such activity is consistent with persons who have an ability to live in

³At F: 46 (DIBP)

India at least on a temporary basis. The visa applicant's son presumably attended schooling there until he was 14 years old and there is no information that suggests there are any compelling reasons why he would not be able to do so again should the visa applicant's wife chose to live there temporarily for a period.

30. Fifthly, I have noted that the visa applicant claims he began working at a car wash, but has worked as a taxi driver for the last 6 years. At the hearing the parties claimed that the visa applicant worked on night shift, whereas his wife works on day shift. This is why they claimed the visa applicant transports him to and from school and cooks for the family occasionally. There is no documentary information before me concerning any aspect of the financial affairs of the family. Significantly there is no explanation as to how the family have coped financially when the visa applicant has been incarcerated (or absent from home for periods as his wife has stated in various correspondence), or for the periods when the visa applicant has been overseas. In any event, it is not unreasonable to expect the family members to make some financial and life style adjustments if their income would be reduced by the visa applicant being offshore for a temporary period as they claim it would be.
31. All of the above putative compelling reasons are directly related to the claimed relationship of the parties. Based on the information the parties have provided to DIBP and then this tribunal I have serious concerns about the mutual genuineness of this relationship. There is a paucity of independent information to support that it is a mutually genuine and continuing relationship and it is inescapable that there is no longer a sponsorship in place. However, even if I presumed that the relationship was genuine and continuing, of itself, this would not found a compelling reason to waive the criteria. There is an expectation that all partner visa applications concern genuine and continuing relationships. The claims the parties have provided are not compelling either individually or collectively and do not powerfully drive me to a conclusion that the Schedule 3 criteria should be waived in this case.

5. 375A notice:

32. The information you provided at the hearing with respect to your criminal history was that you had been charged with the possession and trafficking of drugs, stealing and also the handling of stolen goods. You said that you were also charged with assault but that these charges had been withdrawn. I provided you with an opportunity to provide evidence that the assault charges had been withdrawn.
33. On 21 November 2017 you provided a copy of a letter from your defence lawyer dated 13 June 2017. This letter states that on 8 June 2017, among other things, you pled guilty to 1 count of unlawful assault. However I do acknowledge that the letter also states that; *7 additional charges that had already been laid were withdrawn.*
34. In the tribunal file a s.375A certificate was placed by DIBP on information provided by the Victorian Police to DIBP. This information was then provided to the tribunal on 5 January 2017.
35. At your hearing you openly discussed the offences with which you had been charged and all of the information you provided concurs with the protected information provided by the Police. The tribunal did not disclose the existence of this notice to you at the hearing. However because of influence of *Singh*⁴ it was decided that existence of this notice should be disclosed to you and that you be provided with an opportunity to comment on its validity.

⁴Minister for Immigration and Border Protection v Singh [2016] FCAFC 183

36. On 6 June 2018 the tribunal wrote to you advising you of the existence of the certificate and the relevant content of the protected information. The tribunal requested that any response about the validity of this certificate be provided by 20 June 2018. With respect to the content of the protected information, the tribunal advised you as follows;

6. Furthermore the Tribunal advises you that the relevant contents of this information lists offences for which you were arrested on 29/12/2016. The Tribunal considers that these matters were raised and discussed with you at your hearing conducted on 08/11/2017.

37. The tribunal is satisfied that it has fully discharged its s.359A obligations by; advising you of the existence of the certificate; advising you that the protected information concurs with your evidence at the hearing and there is no further information contained in the protected information that is relevant to this matter, and also giving you an opportunity to comment on the validity of the certificate.

38. On 21 June 2018 the visa applicant contacted the tribunal via a new migration agent requesting a copy of the notice already provided to the visa applicant to determine the time frame in which the visa applicant is to respond. As discussed above this time frame had already expired. The migration agent has also requested access to documents pursuant to section 362A of the Act.

7. Conclusion:

39. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).

40. The tribunal is also satisfied that the circumstances of the visa applicant do not meet the requirements of the alternative sub-clauses cl.820.211 (5), (6), (7), (8), or (9).

41. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

42. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Ian Garnham
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.